***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

74-2107

# United States Court of Appeals

FOR THE SECOND CIRCUIT

GEORGE RIOS, *et al.*,
*Plaintiffs-Appellees,*

—and—

JOHN GUNTHER, *et al.*,
*Applicants to Intervene-Appellants,*

—against—

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., *et al.*,
*Defendants-Appellees.*

UNITED STATES OF AMERICA (EQUAL EMPLOYMENT OPPORTUNITY COMMISSION),
*Plaintiff-Appellee,*

—and—

JOHN GUNTHER, *et al.*,
*Applicants to Intervene-Appellants,*

—against—

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., *et al.*,
*Defendants-Appellees.*

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR PLAINTIFFS-APPELLEES, GEORGE RIOS, *ET AL.*

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# BRIEF FOR PLAINTIFFS-APPELLEES, GEORGE RIOS, ET AL.

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2. Did the District Court's Order remedying racial discrimination against non-whites create a legally protectable interest, within the meaning of Federal Rules of Civil Procedure, Rule 24(a)(2), for white persons who seek to intervene as plaintiffs in order to obtain Union membership?

3. Is the ability of the appellants to protect the interest that they assert impaired or impeded by the disposition of this action when they are not precluded from pressing their interests in another forum?

4. Did the Union's defense of this lawsuit adequately represent the appellants as to the only concern, a concern adverse to plaintiffs' interests, that whites could have had with this action?

## II. STATEMENT OF THE CASE

### A. Preliminary Statement

Appellants, white persons allegedly denied the benefits of Union membership, have sought to intervene in private and federal actions under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§2000e et seq. [hereafter "Title VII"]) brought to redress discrimination on the basis of race, color and national origin in the steamfitting industry in New York City.

The following is a chronology of the major procedural events in the two actions:

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| February 26, 1971 | 71 Civ. 847 (the "Rios case") was filed as a private action under Title VII of the Civil Rights Act of 1964* (named as defendants were the Enterprise Association Steamfitters' Local 638 of the United Association [hereafter the "Union"], the Mechanical |

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* The Rios plaintiffs also alleged claims under the Equal Protection Clause of the United States Constitution and 42 U.S.C. §§1981 and 1983.

Contractors Association of New York, Inc. [hereafter "MCA"] and the Joint Steamfitting Apprenticeship Committee of the Steamfitters' Industry Educational Fund [hereafter "JAC"]).

April 16, 1971 — A Preliminary Injunction was issued in the Rios case. See 326 F.Supp. 198.

June 29, 1971 — 71 Civ. 2877 (the "United States case") was filed by the United States of America as a government action under Title VII of the Civil Rights Act of 1964 (naming, among others, the same defendants named in the Rios case).

August 24, 1971 — An Order allowing the Rios case to proceed as a class action on behalf of blacks and Spanish-surnamed individuals was entered. See 54 F.R.D. 234.

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| January 3, 1972 | A Preliminary Injunction was issued in the United States case. See 337 F.Supp. 217. |
| January 15-<br>January 26, 1973 | A consolidated trial in 71 Civ. 847 and 71 Civ. 2877 was held (47a).* |
| June 21, 1973 | A Judgment and Order was entered on the merits in the consolidated cases (46a-63a). |
| July 20, 1973 | The Union appealed from the Order of June 21, 1973. |
| March 12, 1974 | The Union Appeal was argued. |
| March 29, 1974 | The District Court entered its Order adopting an Affirmative Action Plan (64a). |

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* Numbers in parentheses followed by the letter "a" refer to pages in the Appendix.

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| April 17, 1974 | The appellants moved to intervene in both cases (2a, 6a-21a). |
| June 24, 1974 | This Court decided the Union's Appeal, affirming and remanding the case to the District Court. See 501 F.2d 622. |
| July 9, 1974 | The appellants' Motion to Intervene was denied (3a-5a). |

The instant appeal was taken from the July 9, 1974 Order denying appellants' Motion to Intervene.

B. Statement of Facts

On the basis of findings of racial discrimination in admission to Union membership, the work referral system and the apprenticeship program (52a-54a), the District Court, on June 21, 1973, entered a permanent injunction restraining the Union, MCA and JAC from engaging in any act or practice which had the purpose or effect of discriminating against any individual or class of individuals on the basis of race, color or national origin (59a). The Court made specific provisions for the admission of non-whites to the

"A" Branch of the Union (60a-61a).* In addition, the Court ordered the development of an Affirmative Action Plan by the parties and appointed an Administrator to implement the provisions of the decree, which was to be:

> ". . . designed so that a sufficient number of black and Spanish-surnamed individuals (hereinafter referred to as 'non-whites') will be admitted to full journeyman membership in Local 638's Construction Branch ('A Branch') in order to achieve a minimum goal of 30% non-white membership by July 1, 1977" [60a].

Certain transitory provisions were adopted to help achieve the goal. An initial period of three months was established during which, except for graduates of the apprenticeship program, only non-whites meeting the qualifications of paragraph 11 of the Order (basically a requirement of four years of experience plus successful completion of an examination or certification of employment within the Union's jurisdiction by an employer) would be admitted as members of the "A" Branch of the Union. Non-discriminatory admissions procedures were to be in effect thereafter (61a).

Because large numbers of non-white applicants had not yet been considered for membership by the end of the initial period of non-white admissions, plaintiffs moved for

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* This is the more highly paid branch, as opposed to the Metal Trades or "B" Branch of the Union (48a).

an extension of that period so that a larger number of applicants could be accommodated (72a-88a). By Order of November 20, 1973, the Court directed that, for the purpose of testing non-whites who had applied prior to the date on which the three-month period was to have expired, the period of exclusive non-white admission was to be extended to December 31, 1973 (38a). Other applicants were to be provided with applications for "A" Branch membership and tested and processed in accordance with the June 21, 1973 Order (38a-39a, 61a). Non-whites who requested but did not submit applications before October 12, 1973 were to be given priority in testing and processing over persons seeking admission thereafter (39a). Testing of non-whites continued until February 15, 1974 (33a).

During this same period of time, the parties had submitted proposed Affirmative Actions Plans to the Administrator pursuant to paragraphs 8 and 10 of the June 21, 1973 Order (60a). On March 29, 1974, an Affirmative Action Plan was adopted by the District Court (72a). The goal of the Plan was to reach a minimum of 30% non-white membership in the "A" Branch of the Union by 1977 (65a). The Court directed that:

> "All admission in the Union shall be on the same basis, regardless of race, color or national origin, and the procedures set forth in this

Section [on direct admission to the A Branch] are for the purpose of achieving the goals hereinbefore set forth in paragraph 3." (40a) (emphasis added)

To accomplish this the Union was to admit persons meeting the Plan's experience and testing requirements (40a-41a). In determining the order in which applicants were scheduled to take the examination (42a), the Union, with the approval of the Administrator, was allowed to select separately from non-white and white groups of applicants in regard to the relative quantity and quality of their experience. While the procedures for admission to the "A" Branch were not to preclude the admission of reasonable numbers of skilled whites (44a), to ensure the achievement of the goal, the Union, with the approval of the Administrator, could fix temporary ratios (white and non-white) for the admission of new members to the "A" Branch (44a-45a). After the adoption of the Affirmative Action Plan, appellants moved to intervene.

As applicants to intervene, they alleged that they were members of a class of individuals, other than "non-whites" who held "permits"* from the Union allowing them to perform work within the jurisdiction of the "A" Branch but

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* Persons doing construction work under "permits" receive the same salary and benefits as members of the "A" Branch.

who had been denied membership in the "A" Branch (11a-12a, 18a). They alleged that this denial of membership violated their rights under the Labor Management Reporting and Disclosure Act (29 U.S.C. §§401 et seq.) (hereafter "LMRDA") and the District Court's Judgment and Orders (15a, 18a). These individuals asserted that, although they met the requirements for Union membership established by paragraph 11 of the District Court's June 21, 1973 Order and/or paragraph 16* of the Court's Affirmative Action Plan, they had been denied access to Union membership (10a, 18a).

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* Paragraph 16 of the Plan established admission requirements virtually identical to those established under paragraph 11 of the June 21, 1973 Order except that the provision allowing employer certification as an alternative to completion of the examination was eliminated.

## III. SUMMARY OF ARGUMENT

Appellants, white permit holders seeking Union membership, moved to intervene as of right as plaintiffs in this action in which non-whites have successfully challenged a policy of racial discrimination in the steamfitting industry. The applicants to intervene alleged that under the LMRDA and the District Court's Judgment and subsequent Orders they were entitled to intervene and that they met the requirements of Fed. R. Civ. P. Rule 24(a)(2).* The District Court had broad discretion in determining whether the requirements of the Rule were met, see Chance v. Board of Education of the City of New York, 496 F.2d 820, 826 (2d Cir. 1974), and quite properly exercised that discretion to deny the motion.

Applicants to intervene must meet each condition of Rule 24(a)(2) or else their motion must fail. NAACP v. New York, 413 U.S. 345, 369 (1973). But applicants failed to meet any of the requirements. The denial of applicants'

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* "Upon timely application anyone shall be permitted to intervene in an action: . . .

"(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

motion by the District Court must be affirmed because: (1) The motion, filed more than three years after this action commenced and almost ten months after Judgment, is untimely in the extreme under both the LMRDA and Title VII. (2) Neither the LMRDA (which applicants have in effect abandoned as a basis for their claim) nor the District Court's Judgment and subsequent Orders confer on the applicants a legally protectable interest in the subject of this action, which is racial discrimination in employment. (3) As a practical matter, applicants' ability to protect the interest that they assert is in no way impaired or impeded by the disposition of this action. (4) Any interest which applicants might properly have asserted was one as defendants who would be adversely affected by the relief awarded to plaintiffs, and that interest has been adequately represented by the defendant Union.

## IV. ARGUMENT

### A. The District Court did not Abuse its Discretion in Denying Appellants' Motion to Intervene on Grounds of its Untimeliness.

In a recent case the Supreme Court stated that:

> "[Timeliness] is to be determined by the [district] court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." NAACP v. New York, 413 U.S. 345, 366 (1973) (footnote omitted).

In the exercise of its discretion, the District Court found that applicants' motion to intervene (filed almost ten months after these two consolidated Title VII actions had gone to judgment) was untimely (4a).

An application for intervention is "looked upon with a jaundiced eye" when it is made, as in this case, after final judgment. McDonald v. E.J. Lavino Co., 430 F.2d 1065, 1072 (5th Cir. 1970). Where such a late application for intervention is made, the general rule is to allow intervention only where a "strong showing" is made by the applicant. 7A, Wright & Miller, Federal Practice and Procedure, §1916 at 579 (1972); cf. 3B Moore's Federal Practice 2d ed. ¶24.13[1] at 24.526 ("Intervention after judgment is unusual and not often granted.") As stated by one court:

> "A motion to intervene after entry of the decree should therefore be denied in other than the most unusual circumstances." United States v. Blue Chip Stamp Co., 272 F.Supp. 432, 436 (D.C. Cal. 1967), aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580, reh. denied, 390 U.S. 975 (1968).

See also Harper v. Kloster, 486 F.2d 1134, 1137 (4th Cir. 1973) (motion for intervention made after final judgment denied as untimely in an employment discrimination case); United States v. Carroll County Board of Education, 427 F.2d 141, 142 (5th Cir. 1970) (motion for intervention by black students and parents made after school desegregation plan adopted by the court denied as untimely); NLRB v. Shurtenda Steaks, Inc., 424 F.2d 192, 194 (10th Cir. 1970) (motion for intervention denied as untimely and court stated that applicant who declined to participate in the litigation giving rise to the judgment should not be permitted to claim a violation of that judgment "absent extraordinary and unusual circumstances.") The fact that the judgment was appealed to and affirmed by this Court makes the argument for untimeliness even stronger. cf. Alleghany Corp. v. Kirby, 344 F.2d 571 (2d Cir. 1965); Rios v. Enterprise Ass'n Steamfitters Local 638 of U.A. and Chamber of Commerce of the United States, 73-2110 (2d Cir. Sept. 24, 1974) (motion to intervene by Chamber of Commerce denied by this Court without opinion).

Applicants' heavy reliance on Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967) (Appellants' Brief at 12-15, 22) is misplaced. The Supreme Court had in 1964 remanded the case to the District Court with instructions for divestiture of certain assets of the El Paso Natural Gas Company. See 386 U.S. at 131. Subsequently, in the District Court, three petitioners attempted to intervene and their motion was denied; the District Court approved a consent decree which did not require complete divestiture; and the petitioners appealed the denial of intervention to the Supreme Court. See 386 U.S. at 131, 132. The Supreme Court reversed the District Court and allowed intervention. In very strong language the Court expressed its displeasure with the consent decree which had ignored the Court's mandate ordering divestiture. See 386 U.S. at 136. The Court not only remanded for further proceedings in conformity with its mandate, but also, as if to assure that result, ordered that a different District Judge be assigned to the case. See 386 U.S. at 136, 142-143. The Supreme Court would have been unable to review the failure to comply with its mandate had it not allowed the intervention since there would have been no one to appeal. See 7A, Wright & Miller, Federal Practice and Procedure §1908 at 498-499 (1972).

That Cascade was sui generis is also made clear by United States v. Blue Chip Stamp Co., supra, a case in which a motion to intervene was filed after the entry of a consent decree in an anti-trust case. There the court was faced with a fact situation quite similar to that in Cascade. The court noted, however, that two of the motions to intervene in Cascade were filed before the district court had entered its consent decree, though the court was not certain when the motion of the third petitioner was filed. The court then denied intervention, concluding that:

> "[I]t is clear that [Cascade] does not rewrite Rule 24(a) and (b) to eliminate the requirement of timeliness . . . .
>
> "[I]n view of the fact that the Supreme Court does not discuss timeliness or the dates the petitions were filed, it is clear that [Cascade] cannot be taken as authority for the proposition that intervention may be permitted after entry of a consent decree." 272 F.Supp. at 437.

This opinion was affirmed by the Supreme Court, see 389 U.S. 580 (1967), as have been a number of other cases in which Cascade was characterized as limited to its own facts and as expressing the determination of the Supreme Court that its mandate requiring divestiture should not be ignored by the Justice Department or the District Court.*

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* See United States v. Paramount Pictures, Inc., 333 F.Supp. 1100 (S.D.N.Y.), aff'd per curiam sub nom. Syufy Enterprises v. United States, 404 U.S. 802 (1971) [cited recently in NAACP

(Footnote continued on following page)

Applicants have asserted (though it now appears they have abandoned the point, see infra p. 19 fn.) that they have claims under the LMRDA. Even if this case had not proceeded to judgment before applicants moved to intervene, the LMRDA claim would be untimely. Applicants admit that they have been trying to become members of the "A" Branch of the Union for a number of years (McMillion has been requesting admission for the past 21 years [9a]; Farrell first requested an application blank in January, 1971 [9a]; Gunther made repeated requests for membership after he became a member of the "B" Branch in 1971 [7a]). Evidently they are attempting to use this case as the vehicle for resolution of a long-standing dispute among white members of the Union. There was no abuse of discretion in the District Court's finding of untimeliness as of this claim.

Nor was applicants' Title VII claim timely since, although applicants have never had any legally protectable

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v. New York, 413 U.S. 345, 369 (1973); United States v. Automobile Manufacturers Ass'n Inc., 307 F.Supp. 617, 619 n.3 (D.C. Cal. 1969), aff'd per curiam sub nom. City of New York v. United States, 397 U.S. 248 (1970); United States v. Western Electric, Trade Cas. 1968 ¶72,415 (D.N.J.), aff'd per curiam sub nom. Clark Walter & Sons, Inc. v. United States, 392 U.S. 659 (1968); cf. Spangler v. Pasadena City Bd. of Education, 427 F.2d 1352, 1354 n.3 (9th Cir. 1970); United States v. Aluminum Co. of America and Cupples Products Corp., 41 F.R.D. 342 (E.D. Mo. 1967), appeal dismissed per curiam sub nom. Lupton Mfg. Co. v. United States, 388 U.S. 457 (1967) (shortly after Cascade, the Supreme Court dismissed an appeal in a case similar to Cascade); Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure-I," 81 Harv. L. Rev. 356, 403-407 (1967).

interest in this action, the only arguable concern, legally protectable or not, that any white persons may have had with these race discrimination cases was an interest as defendants in protecting the advantages they had been receiving, as whites, while working under the aegis of the Union. To the extent that any such interest could have been asserted, it should have been asserted long ago -- shortly after these actions were filed and, certainly, well before they were tried.

Moreover, even if the District Court's Judgment is viewed as creating rights for applicants (which it did not) and therefore is taken as the proper event from which to measure timeliness, the application was still untimely, coming as it did, almost ten months after that event. If the even stranger proposition that appellants could not have acted until expiration of the period of exclusive non-white admissions on January 1, 1974 (Appellants' Brief at 8) were to be adopted, appellants still waited four and one-half months before taking action. It is worthy of note that the applicants' own actions were inconsistent with their argument that they could do nothing until January 1, 1974, when they claim to have moved expeditiously to protect themselves -- we find the applicants repeatedly taking action (other than moving to

intervene) to obtain membership both before, and long after, that date.*

In any event, neither the Judgment nor the January 1, 1974 date is the proper event from which to measure timeliness: applicants assert long-standing grievances and, if they considered them in any way related to this case, they should have moved long ago. The applicants, though undoubtedly aware of this litigation and the likelihood that it would result in changes in the Union's admissions policies (cf. Appellants' Brief at 5), as well as the District Court's Order of June 21, 1973, did not come forward until April 17, 1974.

The applicants have not even attempted to make the strong showing which is necessary to justify their attempt to intervene after judgment; nor have they presented any unusual circumstances to support their untimely motion. There was no abuse of discretion in the determination of the District Court that applicants' motion must fail. The exacting standard required of motions for intervention after judgment compelled that result.**

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* Applicant Farrell's last application was made as long ago as in September, 1973 (9a); applicant McMillion's last application was not made until March 22, 1974 (9a); applicant Montanaro's last application was not made until March 7, 1974 (9a).

** 7A, Wright & Miller, supra pp. 579-581.

B. Appellants Have no Legally Protectable Interest at Stake in the Subject Matter of this Action.

The primary requirement for intervention of right is that the applicants have an ". . . interest relating to the property or transaction which is the subject of the action . . . ." Fed. R. Civ. P. 24(a)(2). Applicants asserted two possible sources of interest: the LMRDA* and the District Court's Orders and Judgment. The former claim, if viable in some other court or administrative proceeding, is wholly unrelated to this action.** The District Court's Order and Judgment likewise confer no legal interest. The private plaintiffs in these actions are non-whites. Likewise, the United States of America is suing to protect the rights of non-whites. The Judgment ordered non-discriminatory admissions to redress a previous pattern and practice of

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* In their Brief in this Court appellants now assert, in a footnote, that the Union's actions were illegal because in violation of the doctrine of "fair representation" (Appellants' Brief at 3). Nowhere do they argue that that doctrine provides a basis for intervention. In any event, the issues under that doctrine would be similar to those raised in an LMRDA claim.

** Appellants seem to concede that it is not viable here for they state that their motion was timely because their rights did not arise until the Judgment under Title VII was entered, see Appellants' Brief at 8. The inevitable corollary of this proposition is that applicants, having only their asserted rights under the Judgment, had no rights under the LMRDA.

racial discrimination and to prevent its recurrence, a necessary result in all Title VII actions. If that Judgment is interpreted to confer a legally protectable interest on whites who have been denied membership, then whites will have an interest under all Title VII judgments requiring non-discriminatory admissions procedures.

Although there are no infallible guidelines with which to determine the sufficiency of the interest required by Rule 24(a)(2), the Supreme Court has held that the interest must be ". . . a significantly protectable interest . . ." and "of sufficient magnitude . . . to conclude that [the applicant] is to be allowed to intervene," Donaldson v. United States, 400 U.S. 517, 531 (1971) (emphasis added). In Donaldson the Court held the interest of a taxpayer in an action brought by the Internal Revenue Service to enforce a subpoena against the taxpayer's employer to be insufficient even though the taxpayer was the object of the Internal Revenue Service's investigation in which the subpoena was issued. See also Bennett v. Madison County Board of Education, 437 F.2d 554 (5th Cir. 1970), and Horton v. Lawrence County Board of Education, 425 F.2d 735 (5th Cir. 1970) (interest of an integrated teachers' organization whose black members would be affected by school desegregation actions held to be insufficient); Old Colony Trust Co. v. Penrose Industries Corp., 387 F.2d 939 (3rd Cir.), cert. denied, 392 U.S.

927 (1968) (interest of would-be stock purchasers in action brought by corporation to permit sale of stock to other purchasers who tendered a lower offer for the stock insufficient); United States v. Paramount Pictures, Inc., supra (interest of competitor of a petitioner seeking permission under an anti-trust consent judgment to acquire certain property insufficient).

These principles have also been applied in cases involving employment discrimination. Even where the allegations of the intervenors have had some arguable relationship to such cases, the courts have made it clear that the intervention is to be allowed only where the applicants' interest is significant and directly and substantially related to the racial subject at issue. Accordingly, the courts have denied intervention to even those applicants who assert race-related claims where those claims are separate or different from those raised in the main action. See Doctor v. Seaboard Coast Line R.R. Co., ___ F.Supp. ___, 7 E.P.D. ¶9172 (M.D.N.C. 1974), and ___ F.Supp. ___, 6 E.P.D. ¶8877 (M.D.N.C. 1973) (denying intervention to a non-white employee of the defendant in a Title VII action); Chance v. Board of Examiners, 51 F.R.D. 156 (S.D.N.Y. 1970) (intervention denied to union alleging that its members would be affected by the result of court's order);* cf. Harper v. Kloster, 486 F.2d 1134, 1337 (4th Cir.

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* The District Court subsequently indicated that it would allow permissive intervention to the same applicant as a defendant

1973) (white and black non-residents seeking to relitigate the issue of the eligibility of non-residents for appointment to the Baltimore Fire Department denied leave to intervene); Newmon v. Delta Airlines, Inc., 374 F.Supp. 238 (N.D. Ga. 1973) (woman denied intervention as plaintiff in sex discrimination action because she was attacking different employment policies).

The "significantly protectable" interest asserted by applicants to intervene must be an interest in the property or transaction which is the subject of the action. An analysis of this action clearly indicates that this requirement is in no way met. The sole subject of this action is racial discrimination in employment. Applicants framed their complaint so that the issues in their LMRDA case would be whether or not they are protected as Union members under the LMRDA and, if so, what rights that Act would confer on them (15a-17a, 19a). Whatever the

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(fn. cont'd)
when it became clear that the transfer provisions of its collective bargaining agreement were also affected by the court's order. Intervention was allowed for the limited purpose of contesting a conflict between the court's order and the intervening Union's collective bargaining agreement. Chance v. Board of Examiners, ___F.Supp.___, 7 E.P.D. ¶9084 at 6576 (S.D.N.Y. 1973). This holding provides no assistance to the applicants here. The proposed intervenors in no way suggest that the District Court's Orders conflict with their rights or even that their employment opportunities are affected by the admission of non-whites to the Union.

independent merits of the LMRDA claim, it is remote from the matters at issue in this civil rights action. Plaintiffs in these cases never claimed rights as Union members. On the contrary, they claimed denial of Union membership because of racial discrimination, and racial discrimination has nothing to do with applicants' LMRDA claims.

Insofar as Union membership might be considered "property," within the meaning of Rule 24, the proposed intervenors can have no interest in plaintiffs' "property," i.e., Union membership to which plaintiffs are entitled under Title VII, regardless of what rights to such membership appellants or others may have under the LMRDA or any other legislation. The "transaction" at issue is racially discriminatory behavior in violation of a federal law other than the LMRDA. If the mere fact of filing a Title VII claim opens the door to intervention for all manner of claims by those disgruntled by other allegedly illegal Union action, Title VII's usefulness as a device for the elimination of racial discrimination will be at an end.

Nor may the appellants assert a protectable interest under the District Court's Orders, which were designed to remedy racial discrimination against non-whites. In the context of the history of the defendants' practices, namely admitting whites while denying admission

to non-whites, those aspects of the Orders referring to adoption of neutral selection criteria or persons other than non-whites must be read as purely incidental to the overriding purpose of correcting racial discrimination. After an initial period of exclusive non-white admissions, the Union was permitted again to admit whites.

Moreover, appellants' argument that the Orders protect whites overlooks an important distinction -- the Union's admission procedures exist independently of the Court's Orders. The Court required the Union to adopt non-discriminatory admissions procedures. If they are being unfairly administered, that may or may not be remediable under some law not invoked in this proceeding or in some other forum. Absent an element of discrimination, it is not remediable under Title VII and, hence is not remediable under the Court's Orders which derive solely from that Act.

Judge Bonsal, discussing the purpose of the relief granted, stated at a post-trial conference:

> ". . . our efforts here are predicated on the minority representation and the minority jobs. I don't think I have an issue in this case at the present time that there shall be X thousand steamfitters in the City of New York. I don't think that that is in this case . . . [t]he issue I have is to see that the . . . people who are classified and who have the experience and who are minority people have an opportunity to be steamfitters . . . ." (175a)

The purpose of each of the Court's Orders was to remedy the racial discrimination found in the Union and its apprenticeship program through revised procedures designed to prevent racial discrimination in the future by establishing a goal of 30% non-white membership in the "A" Branch by 1977 (40a, 59a, 60a). The Court's purpose was not to take complete control over the Union's admission procedure, as appellants suggest (Appellants' Brief at 5), but to correct and prevent the recurrence of the racial discrimination which had been rampant in the industry. As the Court stated in its Opinion denying intervention:

> "The purpose of the Court's Order of June 21, 1973 and of the Affirmative Action Plan was to correct past discrimination in the steamfitting industry with respect to non-whites and to establish procedures to prevent such discrimination in the future." (3a)

Even had it wished to do so, the Court could not have created an interest for appellants because Congress explicitly rejected an effort to graft a remedy for claims such as that sought by appellants onto Title VII.* An

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* By contrast in the cases of Trbovich v. United Mine Workers of America, 404 U.S. 528, 531 (1972), and Hodgson v. United Mine Workers of America, 473 F.2d 118, 128 (D.C. Cir. 1972), cited by appellants (Appellants' Brief, passim), the proposed intervenors, unlike those in this case, were clearly the intended beneficiaries of the legislation under which the claims were brought.

amendment to Title VII proposed by then Representative Cahill of New Jersey was intended to make it an unlawful employment practice under the Title for a union to exclude persons from membership on any basis. Rep. Cahill stated the purpose of his amendment as follows:

> "The purpose of my amendment is to permit any qualified person to become a member of a union and not to limit the authority of the Commission [EEOC] merely to cases of disqualification on the basis of race, color, creed, or national origin." 110 Cong. Rec. 2593.

The amendment was rejected. 110 Cong. Rec. 2593-2595. As Rep. Roosevelt of California noted in speaking for rejection:

> ". . . [T]his bill is limited to discrimination on account of race, color or creed. The gentleman from New Jersey may have a very laudable idea in his mind, and certainly, perhaps, one that should be given consideration, but it has nothing to do with this bill. I earnestly ask my colleagues on the committee not to bring into the bill subject matter which has really nothing to do with the bill at all." 110 Cong. Rec. 2594.

Here the applicants, white workers, sought intervention in this racial discrimination action, not as defendants, but as plaintiffs. In claiming rights under the Orders, the applicants to intervene would have the Court view them as part of the solution, when in fact they were part of the problem. For years they enjoyed, as permit holders, the advantages of working under the aegis of the Union, receiving the same

salary and benefits as members of the "A" Branch.* Together with the members of the "A" Branch, these permit holders had long enjoyed employment rights denied to non-whites. In the year 1971, for example, it took substantial efforts to provide an opportunity for some 100 skilled non-whites, who were not Union members, to work under permit on "A" Branch jobs (162a-171a). Yet an industry analysis of hours paid in that year indicates that the total number of non-members working on such jobs was 1,629, virtually all of the rest of them being white (172a).

It was to obtain for non-whites the opportunities extended to persons like the applicants to intervene that these two actions were filed. It would be ironic indeed if some of the very whites who took advantage of the informal procedure by which white non-members of the Union were allowed to work within the Union's jurisdiction were now allowed to assert successfully that they are entitled to Union membership under the decree laboriously obtained by non-whites to secure for themselves the long-denied opportunity to work as Union members.

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* Applicant Gunther had worked under an "A" Branch permit for three years (7a); applicant McMillion had been working under an "A" Branch permit for up to 21 years (8a); applicant Lonigro has worked under an "A" Branch permit for 7 years (8a); applicant Borelli has worked under an "A" Branch permit for 5 years (8a); applicant Montanaro has worked under an "A" Branch permit for 6 years (8a); and applicant Donnegan has worked under an "A" Branch permit for 4 years (8a).

C. The Disposition of this Action Does not as a Practical Matter Impair the Appellants' Ability to Assert Their Claims Against the Union.

Rule 24(a)(2) requires that applicants for intervention demonstrate that disposition of the action ". . . may as a practical matter impair or impede [their] ability to protect [their] interest . . . ." The rule has been applied in this Circuit to deny intervention in a securities action brought by the Securities and Exchange Commission, to persons seeking damages under federal securities laws against the same defendants and based on the same transactions. S.E.C. v. Everest Management Corp., 475 F.2d 1236 (2d Cir. 1972).

The Court there pointed out that the applicants would not be precluded by res judicata or collateral estoppel from bringing their own action for money damages regardless of the disposition of the SEC action. That they would be required to bear the financial burden of duplicating the SEC's efforts or that they would be unable to develop the record as fully because they did not have the SEC's staff and resources was "not the sort of adverse practical effect contemplated by Rule 24(a)(2)." S.E.C. v. Everest Management Corp., supra p. 1239. Accord, Ionian Shipping Co. v. British Law Ins. Co., 426 F.2d 186, 190-191 (2d Cir. 1970).

Here applicants' asserted claims against the Union are in no way affected by disposition of this action because:

(1) The LMRDA claims are wholly independent of plaintiffs' Title VII claims and will be unaffected by anything that happens in these cases.

(2) The only interest these white applicants to intervene could possibly have had in plaintiffs' Title VII claims was an interest, adverse to plaintiffs, in preserving white control over the available work, but applicants specifically abdicate this interest (Appellants' Brief at 17, 21). Consequently it is impossible to see how appellants' ability to protect a Title VII interest could be impaired if these cases proceed without their participation.

Finally, it should be noted that the applicants are free to attempt to enforce the Union's new admissions rules under whatever theory and in whatever forum they choose. In fact this point highlights a central defect in applicants position: the mere fact that the Union's new non-discriminatory admissions procedures might be enforceable in their favor does nothing to advance their need to intervene in this action. All they are denied by being denied intervention is the right to enforce those requirements for whites in this case.

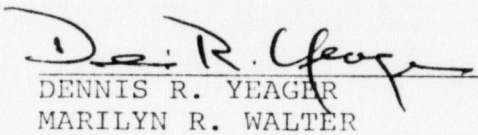
D. Appellants Are Adequately Protected Because Any Concern Which Whites May Have with This Action Has Been Adequately Represented by the Parties.

Whatever complaint the appellants to intervene have against the Union in some other lawsuit, the appellants have been adequately represented by the Union as to the only concern whites could have with this action, that of persons who might be adversely affected by the relief awarded to the non-white plaintiffs-appellees. The Union has tenaciously protected the virtually exclusive control of steamfitting work enjoyed by white members and permit-holders alike. See supra p. 27. Moreover, the long period of pre-trial proceedings and the appeals from the Court's Order and Judgment taken by the Union attest to the vigor with which the applicants' interest was represented during the course of this litigation. Consequently, applicants' motion to intervene was properly denied because their interest is adequately represented by one of the parties.

## V. CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

Respectfully submitted,



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Dated: New York, New York
January 27, 1975

CERTIFICATE OF SERVICE

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